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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KIYANA CAMILE FOSTER,

Defendant and Appellant.

B187978

(Los Angeles County
Super. Ct. No. YA060264)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew C. Kauffman, Judge. Affirmed with modifications.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels, and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Kiyana Camile Foster, appeals from her admission she violated the terms of her probation and the ensuing judgment. Defendant initially pled guilty to charges of first degree burglary (Pen. Code,¹ § 459) and assault with a deadly weapon. (§ 245, subd. (a)(1).) Further, defendant had admitted she inflicted serious bodily injury. (§ 12022.7, subd. (a).) Defendant argues the trial court failed to reinstate probation following the probation violation hearing. The Attorney General argues that defendant was awarded excessive presentence conduct credits. We affirm with modifications.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) The facts related to defendant's guilty plea and admissions to the great bodily injury enhancement are taken from the preliminary hearing and the probation officer's report. Kelley Jeffries and defendant lived together for approximately one month. They lived in Ms. Jeffries' residence. On November 21, 2004, defendant appeared to be "high on something." Defendant was told that she should gather her belongings and move out. Defendant responded that she was going to throw "a cocktail" at the house. Defendant made the same threat as to Ms. Jeffries' car. Ms. Jeffries believed that defendant intended to throw something with fire and gas. Defendant also threatened to kill Ms. Jeffries. On November 22, 2004, defendant returned to recover her clothing that she had left on the front lawn. Defendant rushed toward Ms. Jeffries. While doing so, defendant threatened Ms. Jeffries with a crow bar. Defendant told Ms. Jeffries, "'Bitch, I'll fuck you up.'"

At approximately 3:30 a.m. on November 23, 2004, Ms. Jeffries was asleep on the couch in her living room. Ms. Jeffries was awakened by the smell of bleach and the sense that she was wet. Ms. Jeffries noticed that the phones that she normally kept close to her were missing and the cord for the charger had been removed from the wall. Ms.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Jeffries saw defendant in the kitchen. Defendant was putting Ms. Jeffries' clothing and other personal possessions into a bag. Ms. Jeffries asked: "'Why are you in the house? What are you doing in my house?'" As this was occurring, Ms. Jeffries struck defendant. Defendant grabbed a glass, broke it and attempted to cut Ms. Jeffries. Defendant grabbed a butcher knife and stabbed Ms. Jeffries in the leg. Ms. Jeffries testified the following transpired: "[Defendant] said, 'Bitch, I told you I was going to kill you. I told you I was going to kill you.' [¶] She said something about somebody in a car with a gun and they were going to kill me anyway. And that's when I screamed for my daughter to wake up. I told her to go upstairs and to get my neighbor and . . . [defendant] was in the house and that she had stabbed me." Defendant threatened to kill Ms. Jeffries' daughter. Defendant told Ms. Jeffries' daughter: "If you leave do you want me to kill your mom? If you leave I'll kill your mom." Ms. Jeffries eventually was able to disarm defendant. Ms. Jeffries was able to drag defendant out of the house. Defendant removed a lighter from her coat pocket. Thereupon, defendant attempted to ignite Ms. Jeffries's shirt. However, the shirt did not ignite.

Defendant had an extensive criminal record. She was the subject of three separate sustained delinquency petitions. Further, she had six prior misdemeanor convictions. She had repeatedly failed to obey probation conditions. Following her guilty plea, defendant was sentenced to state prison for a total term of 8 years, 4 months. However, the trial court suspended execution of the sentence and placed defendant on five years formal probation. Defendant later violated several of her probation conditions by: using illegal drugs; failing to complete an anger management program; and failing to enroll in a drug program. Defendant admitted that she was in violation of her probation.

Defendant's sole issue on appeal is that the trial court failed to exercise its discretion to continue her probation rather than order the previously imposed state prison sentence. We review this contention for an abuse of discretion. (*People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Lichens* (1963) 59 Cal.2d 587, 588-589.) The California Supreme Court has held: "In reviewing for abuse of discretion, we are guided

by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978; *People v. Superior Court (Du)* (1992) 5 Cal.App. 4th 822, 831; *People v. Preyer* (1985) 164 Cal.App.3d 568, 573.)

In *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088, the California Supreme Court held: “[S]ection 1203.2, subdivision (c), recites that following the defendant’s rearrest, and on revocation and termination of probation, ‘if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that *the judgment shall be in full force and effect.*’ (Italics added; see also [Cal. Rules of Court,] rule 435(b)(2))” In addition, the trial court has the discretion to modify and reinstate a defendant on probation following a violation finding. (*People v. Medina* (2001) 89 Cal.App.4th 318, 321 [“numerous cases have recognized that the court’s authority to modify probation necessarily presumes the power to reinstate it”]; *People v. Jones* (1990) 224 Cal.App.3d 1309, 1314; accord *People v. Hawthorne* (1991) 226 Cal.App.3d 789, 792; *People v. Harris* (1990) 226 Cal.App.3d 141, 147; *People v. Pennington* (1989) 213 Cal.App.3d 173, 175-176.)

At the time defendant was granted probation, the trial court cautioned her: “. . . I want to emphasize that you have been sentenced in this case already to the state prison. If you violate any term or condition of your probation, you should assume that sentence

will go into effect. [¶] Do you understand?” Defendant responded, “Yes.” On September 15, 2005, the trial court noted that defendant was present at the direction of the probation department which had filed a violation report indicating she had used narcotics, had not enrolled in a drug program, and had not completed an anger management course. At the probation revocation hearing and in her violation report, the probation officer, Stephanie Wilson, recommended that defendant be placed in a secure residential drug program. Thereafter, defendant admitted she violated probation.

At the subsequent sentencing hearing, defense counsel urged the court to place defendant in a 12-to-18-month structured drug program as recommended by Ms. Wilson. The trial court heard the prosecutor’s argument to the contrary. The trial court then inquired about the possibility of a state prison program that would allow defendant’s children to be with her or a commitment to the California Rehabilitation Center. However, defendant’s offense and sentence precluded her placement in either program. The trial court also allowed defendant to explain why she should be given another chance to undergo probation supervision. Defendant explained that she had entered a drug program but left there because of unfavorable conditions. Defendant requested assistance from Ms. Wilson in securing placement in another drug program. Although she did not have money to make all restitution, defendant said she had made partial payments. Defendant explained: “I feel that I don’t deserve the eight years right now. Just -- I don’t understand. If I caught another case or a violent case, then I could understand. But I understand now that it’s not a joke, and I did take it for granted. [¶] I didn’t think that it was this serious, that a joint suspended was this serious, but me being in custody for 56 days that I have – I understand that is not a joke.” In selecting the state prison sentence, the trial noted: “[Defendant], we’ve known for a while you had a problem with PCP. That was why you were involved in this activity in the first place when you committed these crimes in the first place. [¶] You had an opportunity to address your problem. You didn’t. You didn’t take the opportunity. [¶] The [prosecutor] is correct in whether you believed it or not or whether you felt it was a serious situation or not, the agreement

that you entered into was that, if you violated any condition of probation, that you would be sentenced to state prison for eight years and four months. You violated a condition of probation. That's what's going to happen."

In support of her claim that the trial court did not exercise its discretion, defendant cites *People v. Lara* (2001) 86 Cal.App.4th 139, 165: "To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. [Citation.]" Here, the trial court understood and exercised its discretion to reinstate defendant on probation rather than order the previously imposed state prison sentence into effect. At the initial appearance on the violation, the trial court indicated, "The court would consider releasing [defendant] after a suitable residential drug treatment program as well." At the revocation hearing, the trial court pursued the drug program alternative with Ms. Wilson and defense counsel. Thereafter, at the sentencing hearing, the trial court heard extensive argument from defense counsel and the prosecutor. Further, the trial court heard defendant's own explanation for her behavior and plea for leniency in light of her responsibility for her three small children. As evidenced by its comments, the trial court's ultimate decision to reinstate defendant's state prison sentence was based upon both the law and its consideration of all those arguments. Defendant had an extensive juvenile and misdemeanor record. Her conduct in this case involved serious violent misconduct and a threat to kill Ms. Jeffries' daughter. No abuse of discretion occurred.

Following our request for further briefing, the parties agree that the trial court awarded excessive presentence conduct credits. We agree. The failure to award the proper amount of credits is a jurisdictional error which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Duran* (1998) 67 Cal.App.4th 267, 270; *People v. Acosta* (1996) 48 Cal.App.4th 411, 415-428.) Defendant pled guilty to assault

with a deadly weapon (§ 245, subd. (a)(1)) and admitted that she caused great bodily injury as defined in section 667.5, subdivision (c)(8). Section 2933.1, subdivision (c), limits the amount of presentence conduct credits for those convicted of violent felonies to 15 percent. Defendant received an incorrect award of presentence credits. She should have received 56 days of actual credit plus 8 days of conduct credit. (§2933.1, subd. (c).) Accordingly, her total credits are 64 days. The abstract of judgment must be corrected in this regard. The trial court must insure the abstract of judgment is corrected to comport with its order. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

Upon issuance of the remittitur, the superior court clerk is directed to issue an amended abstract of judgment which correctly reflects the correct presentence credits and forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.